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No. 268

In the Supreme Court of the United States

OCTOBER TERM, 1959

WALTER C. LOHMAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a–5a) is reported at 266 F. 2d 3. The opinion of the Court of Appeals reversing the petitioner's conviction following his first trial is reported at 251 F. 2d 951.

JURISDICTION

The judgment of the Court of Appeals was entered on May 5, 1959 (Pet. App. 5a), and a petition for rehearing was denied on June 1, 1959 (*ibid.*). On June 24, 1959, Mr. Justice Stewart entered an order extending the time for filing a petition for a writ of certiorari to and including July 31, 1959. A typewritten copy of the petition was filed on that date

and, thereafter, the Government was served with a printed copy of the petition on November 4, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment was fatally defective because it did not charge, in *haec verba,* that the petitioner's false statements were material.

2. Whether the evidence is sufficient to support the verdict.

3. Whether the petitioner was deprived of a fair trial because of (*a*) limitations imposed by the trial court on the cross-examination of a Government witness, or (*b*) the trial court's rulings on the application and construction of 18 U.S.C. 3500.

4. Whether the petitioner's conviction for violation of 18 U.S.C. 1001 for filing a false non-Communist affidavit violated the provisions of the First Amendment.

5. Whether the trial court's instructions on the meaning of the terms "membership" and "affiliation" were proper.

STATUTES INVOLVED

The text of 18 U.S.C. 1001; Section 9(h) of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947, c. 120, § 101, 61 Stat. 136, 146 (29 U.S.C. 159(h));[1] and 18 U.S.C. 3500 are set forth in the petition at pp. 3–6.

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[1] Section 9(h) was repealed on September 14, 1959 by Section 201(d) of the Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, 73 Stat. 519. Section 504(a) of the new Act, however, provides that no person who is or

STATEMENT

The petitioner was charged, in a two-count indictment returned on November 21, 1952, in the United States District Court for the Southern District of Ohio, Western Division, with violation of 18 U.S.C. 1001 (Pet. 3–4), by falsely swearing on or about December 6, 1949, in an affidavit filed with the National Labor Relations Board pursuant to the provisions of Section 9(h) of the National Labor Relations Act, as amended (29 U.S.C. 159(h)) (Pet. 4), that he was not a member of (Count I), or affiliated with (Count II), the Communist Party.

Following a trial by jury, the petitioner was found guilty on both counts in September, 1955, but on appeal to the Court of Appeals his conviction was reversed and a new trial ordered because the trial court had failed to order production of pre-trial statements of Government witnesses in accordance with the rule laid down by this Court in *Jencks* v. *United States*, 353 U.S. 657 (*Lohman* v. *United States*, 251 F. 2d 951 (C.A. 6)). Upon retrial, the petitioner was again convicted on both counts (R. 433) and was sentenced to five years imprisonment on each count, the terms to run concurrently. On appeal to the Court of Appeals for the Sixth Circuit, the judgment of conviction was affirmed (Pet. App. 1a–5a).

The evidence presented by the Government may be summarized as follows:

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has been a member of the Communist Party may hold office in a labor organization or association of employers dealing with a labor organization during, or for five years after the termination of, his membership in the Communist Party.

The petitioner was an active member of the Communist Party and a regular attendant at its meetings from early in 1948 to the latter part of 1951. The petitioner was enrolled in the Party on February 22, 1948, by Government witness Arthur Strunk (R. 173–174) who was then financial secretary of the Dayton, Ohio, branch of the Party (R. 172). At the time of enrollment Strunk collected an initiation fee and dues for the month of March, 1948, from the petitioner and issued to him a registration card bearing the number 62,575 (R. 173–174, G. Ex. 6, R. 320). Shortly thereafter Strunk received a donation from the petitioner for the sustaining fund and national fund of the Party (R. 178–179). The petitioner, following his enrollment, was assigned to the "Amalgamated Club", a group of Party members who were either officials of Amalgamated Local 768, United Electrical, Radio and Machine Workers of America, or worked for employers whose employees were represented by that union (R. 32–34), and during the year 1948 attended many meetings of the Party in Dayton (R. 35–37, 180–183).

In 1949 the petitioner renewed his registration in the Party (R. 183) and continued to attend its meetings (R. 55–59, 183–185). At a meeting held at Bryant Park near Yellow Springs, Ohio, that same year he discussed with other members the Party's paper—"The Worker"—and promised to solicit subscriptions for the paper (R. 58–59). On December 3, 1949, the petitioner attended a Party meeting at the home of

Melvin Hupman[2] in Dayton (R. 183-185). Lon Chancey, who, at that time, was Secretary of the Ohio Communist Party, was also present at this meeting and he told the members that reregistration would be handled "a little bit different" for the year 1950 (R. 184). He pointed out that because of the Party's "new national policy" of compliance with Section 9(h) added by the Taft-Hartley Act, five Party members in Dayton would have to sign non-Communist affidavits. These five members, Chancey said, would henceforth report as a separate group which was to be known as the Taft-Hartley or T-H group (R. 184–185). The petitioner was designated as a member of this group (R. 185).

A few days later, on December 6, 1949, the petitioner, as an officer of Amalgamated Local 768, United Electrical, Radio and Machine Workers of America (R. 10), signed and procured notarization of a non-Communist affidavit at the office of the union in Dayton (G. Ex. 1, R. 24–25, 29). Upon the filing by Local 768 of the necessary documents, including the petitioner's affidavit, at the ninth regional office of the National Labor Relations Board in Cincinnati, Ohio (G. Exs. 1, 2, R. 7–11, 13), the latter notified Local 768 by letter that it was placed in compliance with Section 9(h) of the National Labor Relations Act, as amended, until February 1, 1950 (G. Ex. 3, R. 11-12).

Following the execution and filing of the affidavit,

[2] In 1954, Hupman was also convicted of filing a false non-Communist affidavit with the National Labor Relations Board. *Hupman* v. *United States*, 219 F. 2d 243 (C.A. 6), certiorari denied, 349 U.S. 953.

the petitioner remained an active member of the Communist Party and attended meetings of the Party in Dayton, in 1950 and in 1951 (R. 131–133, 185–193, 194–196). Even as late as October, 1951, witness Strunk testified that he received from the petitioner a ten dollar contribution to the sustaining fund of the Party which was used for the support of the Party's full-time organizer of the Dayton section (R. 193–194).

ARGUMENT

We submit that the Court of Appeals correctly affirmed the petitioner's conviction and that this case presents no issue calling for review by this Court.

1. There is no substance to the petitioner's contention (Pet. 19–21) that the indictment was fatally defective because it failed to allege the materiality of the false statements. Assuming that the provisions of 18 U.S.C. 1001, prohibiting false statements and documents require that the misrepresented facts be material (but cf. *United States* v. *Silver*, 235 F. 2d 375, 377–378 (C.A. 2)), the indictment here was sufficient since it was substantially in the language of the statute and since it alleged the essential elements of the crime with enough particularity to apprais the petitioner of the nature of the charge. *United States* v. *Debrow*, 346 U.S. 374; *Hagner* v. *United States*, 285 U.S. 427, 431; *United States* v. *Behrman*, 258 U.S. 280, 288; Rule 7(c), F.R. Crim. P. The court below has previously held that an identical indictment sufficiently charged that the false statements were material, *Hupman* v. *United States*, 219 F. 2d 243, 248, n. 5, certiorari denied, 349 U.S. 953.

The Government proved that the petitioner executed and signed the affidavit (R. 23–29; G. Ex. 1) and that his union Local 768, United Electrical Radio and Machine Workers of America, was placed in compliance with Section 9(h) of the National Labor Relations Act, as amended, as a result, *inter alia*, of the filing of his affidavit with the ninth regional office of the National Labor Relations Board (R. 6–14; G. Exs. 1–3). This evidence proved the materiality of the petitioner's false statements. *Sells* v. *United States*, 262 F. 2d 815, 818–819 (C.A. 10), certiorari denied, 360 U.S. 913. Thus, assuming *arguendo* that the false statements were required to be material, there was no failure of proof in the present case.[3]

2. There is likewise no substance to the petitioner's contention (Pet. 12–14) that the evidence was insufficient to prove his membership in the Party on the dates the affidavit was executed and filed. The Government proved through the testimony of four witnesses (R. 30–36, 53–60, 130–132, 171–196) that petitioner was an active member of the Communist Party and regular attendant at its meetings continuously from February 1948 through October 1951. One of the meetings referred to took place within three days of the date of the affidavit (see R. 183–185). It was not necessary to introduce direct evidence of his membership on the precise date; it was sufficient if his membership on that date was inferable

[3] There was clearly no error, moreover, in the trial court's charge to the jury (see Pet. 12) that the materiality of the false statements was established as a matter of law. Cf. *Sinclair* v. *United States*, 279 U.S. 263, 298.

from the evidence of his membership before and after that date.[4] See *Hupman* v. *United States*, *supra*, at 248; *Jencks* v. *United States*, 226 F. 2d 540, 547–548 (C.A. 5), reversed on other grounds, 353 U.S. 657; *Fisher* v. *United States*, 231 F. 2d 99, 103 (C.A. 9); *Bryson* v. *United States*, 238 F. 2d 657, 663 (C.A. 9), certiorari denied, 355 U.S. 817; *United States* v. *Killian*, 246 F. 2d 77, 80–82 (C.A. 7), reversed on rehearing on other grounds, 246 F. 2d 82; *Sells* v. *United States*, *supra*, at 820; *Travis* v. *United States*, 269 F. 2d 928, 936–937 (C.A. 10), pending on petition for a writ of certiorari, No. 479, this Term.

3. A Government witness, Arthur Strunk, testified on direct examination that he joined the Communist Party in 1944 at the request of the F.B.I. (R. 171). On cross-examination he was asked whether he was not in fact a Party member before 1944 and he answered—"Definitely not" (R. 222). He was then asked whether he had not made a statement to one Rinehart, at a party, to the effect that he was a member of the Communist Party before 1944 (R. 222–223). The trial court sustained an objection to this latter question, pointing out that impeachment should be restricted to matters which the witness testified to on direct examination (R. 223). Later, petitioner's

[4] Since the sentence imposed on the affiliation count of the indictment was made to run concurrently with the sentence imposed on the membership count (Pet. 8), there is no necessity to consider the petitioner's contention (Pet. 14) that the evidence was insufficient to prove he was affiliated with the Communist Party on the date the affidavit was filed. *Lawn* v. *United States*, 355 U.S. 339, 359; *Roviaro* v. *United States*, 353 U.S. 53, 59, n. 6; *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105.

counsel called Rinehart as a witness and he testified that he knew Strunk as a member of the Communist Party during the period he (Rinehart) was a member of the Party from 1939 to 1942 (R. 346-347). The petitioner's counsel then asked Rinehart whether Strunk had not made a statement to him in 1941 at a party to the effect that he (Strunk) was and had been for some time a member of the Communist Party (R. 349–352). An objection to the question was sustained by the trial court (R. 352). Counsel then made a proffer to the effect that the answer to the question would have been "Yes" and asked the court why the question was objectionable (R. 352). The trial judge answered that no foundation had been laid for the question by asking the witness whether he had made such a statement to which counsel remarked that according to his recollection he had asked Strunk the same question on cross-examination (R. 352–353). Thereafter, the matter was dropped. The petitioner, relying on the decision of the Court of Appeals for the Ninth Circuit in *Cossack* v. *United States*, 63 F. 2d 511 (C.A. 9), contends that the refusal of the trial court to permit him on cross-examination of Strunk to lay a foundation for the impeaching testimony Rinehart was prepared to give was prejudicial error and requires a reversal of his conviction (Pet. 10–11, 15–18).

It is well settled, however, as the court below noted (Pet. App. 2a–3a), that the extent to which cross-examination may be permitted in the circumstances of each case lies within the sound discretion of the trial court. *Glasser* v. *United States*, 315 U.S. 60,

83; *Alford* v. *United States*, 282 U.S. 687, 694. This is especially so when such cross-examination relates to collateral matters. *Blitz* v. *United States*, 153 U.S. 308, 312; *Dolan* v. *United States*, 218 F. 2d 454, 459 (C.A. 8), certiorari denied, 349 U.S. 923. Generally, the trial court's action in this respect will not be interfered with unless there has been a plain abuse of discretion. *United States* v. *Manton*, 107 F. 2d 834, 845 (C.A. 2), certiorari denied, 309 U.S. 664; *Lindsey* v. *United States*, 133 F. 2d 368, 369 (C.A.D.C.). We submit that there was no such abuse of discretion by the trial court below.

Whether Strunk became a member of the Communist Party in 1944 or before that date was clearly a collateral matter. It had no tendency to impeach his testimony that he knew the petitioner as a member of the Communist Party from 1948 through 1951 (*supra*, pp. 4–6). On this score alone, therefore, the trial court was justified in refusing to permit the petitioner's counsel to interrogate him with respect to alleged prior statements he made purportedly admitting that he had been a Party member before 1944. In this connection it has been held that a witness cannot be impeached by showing contradictory statements made by him which are not relevant to any issue in the case. *Dillard* v. *United States*, 141 Fed. 303, 310 (C.A. 9); *United States* v. *Lawinski*, 195 F. 2d 1, 8 (C.A. 7).[5]

[5] The circumstances here, moreover, are clearly distinguishable from those in the *Cossack* case, *supra*, relied on by the petitioner. In *Cossack* the defense had made *repeated* unsuccessful offers to lay the foundation for the impeachment both *during* and *after* the prosecution witness' cross-examination and

In any event, even if the trial court erred in refusing to permit the particular question complained of to be asked, it is clear that the error was harmless. Defense counsel *was* permitted to ask Strunk on cross-examination whether he was a member of the Party before 1944 and Strunk answered that he was not (R. 222). Thereafter, Rinehart was permitted to testify that he knew Strunk as a Party member from 1939 to 1942 (R. 346–347). Thus, the very facts which petitioner was attempting to elicit by the excluded questions were already in evidence for consideration by the jury.

4. Contrary to the petitioner's contention (Pet. 18–19), he was not deprived of a fair trial by the trial court's rulings with respect to production of pre-trial statements of Government witnesses pursuant to the provisions of 18 U.S.C. 3500. The trial court correctly interpreted and applied Section 3500 in a manner consistent with this Court's later construction and application of the statute in *Palermo* v. *United States*, 360 U.S. 343, and *Rosenberg* v. *United States*, 360 U.S. 367, and, pursuant thereto, ordered production of all documents to which the petitioner was properly en-

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the prosecution witness, who at the time of her testimony was on probation after pleading guilty to a felony charge, had been permitted to testify after the Government had closed its case. In addition, her testimony was highly prejudicial to the defendant and the impeaching evidence which was newly discovered, would have tended to establish that she was biased and that her testimony was fabricated. The court held that "[i]n view of all these circumstances" the trial court had abused its discretion in refusing to allow the defense to present this "newly-discovered" evidence to the jury. *Cossack* v. *United States*, *supra*, 63 F. 2d at 516.

titled under the statute. See R. 64, 69–71, 140–141, 198, 200–201. The trial court neither deprived the petitioner of an opportunity to cross-examine the Government's witnesses as to any additional reports which they might have made to the F.B.I. concerning matters they had testified to on direct examination (R. 61–122, 135–162, 196–319), and which allegedly had not been produced by the prosecution pursuant to the court's original orders to produce (see Pet. 18–19), nor refused to order the production of any such reports (See Pet. 18). Contrary to the petitioner's suggestion (Pet. 18), the cross-examination did not develop evidence that other reports concerning the subject matter of the witnesses' direct testimony had been furnished to the F.B.I., but merely that other reports concerning matters *outside the scope of the direct examination* had been submitted by the witnesses to the latter. See *e.g.*, R. 210–214, 289–290. The trial court's denial of the petitioner's motions for the production of these additional reports was based on the ground that they did not relate to the subject matter of the witnesses' direct testimony (R. 214–217, 289). The denial of these motions on this basis was clearly proper under the statute and decisions of this Court. 18 U.S.C. 3500(b); *Rosenberg* v. *United States*, *supra*, 360 U.S. at 370; cf. *Jencks* v. *United States*, 353 U.S. 657.

5. In *American Communications Assn.* v. *Douds*, 339 U.S. 382, this Court upheld the constitutionality of Section 9(h) of the National Labor Relations Act, as amended (29 U.S.C. 159(h)). See also *Osman* v. *Douds*, 339 U.S. 846. The petitioner, in effect, asks

the Court to reexamine its decisions sustaining the validity of the statute (Pet. 21–24).

There is plainly no substance to the petitioner's suggestion that the statute could not be constitutionally applied to him or that he was erroneously deprived of showing the lack of "impact" of the case on interstate commerce (Pet. 21–22). Section 9(h), before its repeal (see *supra*, p. 2, n. 1), validly applied to all responsible union officers whose unions desired to utilize the services of the National Labor Relations Board. The Board, moreover, plainly had jurisdiction over matters involving the petitioner's union and the industry and employers whose employees that union represented after the union complied with Section 9 (f), (g) and (h) by filing with it the necessary documents, including the petitioner's affidavit.

There is likewise no substance to the petitioner's contention (Pet. 22–23) that he was convicted for the exercise of rights protected by the First Amendment. Contrary to his suggestion (Pet. 22) he was not convicted because he attended meetings, engaged in political and economic discussions, or participated in other lawful activities, but because he falsely denied membership in and affiliation with the Communist Party on December 6, 1949. The Government's use of such evidence to prove his membership and affiliation with the Party on the crucial date was in no sense a violation of the petitioner's First Amendment rights. As this Court pointed out in *American Communications Assn.* v. *Douds*, *supra*, 339 U.S. at 412: "[t]hose who * * * would subvert the public interest

cannot escape all regulation because, at the same time, they carry on legitimate political activities."

6. Finally, the correctness of the trial court's instructions on the meaning of the terms "membership" and "affiliation" is well settled in light of the previous pronouncements of this Court and other federal appellate courts, and the petitioner's contentions (Pet. 22, 23) to the contrary are plainly without merit. Cf. R. 417–423 with *Joncks* v. *United States*, 353 U.S. 657, 679–680 (concurring opinion); *Galvan* v. *Press*, 347 U.S. 522, 528–529; *Bridges* v. *Wixon*, 326 U.S. 135, 142–144; *Travis* v. *United States*, 269 F. 2d 928, 941–944 (C.A. 10); *Travis* v. *United States*, 247 F. 2d 130, 135–136 (C.A. 10); *Fisher* v. *United States*, 231 F. 2d 99, 106–108, 107, n. 2 (C.A. 9).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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